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SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 306

INTERCO INCORPORATED — Appellant

vs.

ARNY RHODEN, CHAIRMAN OF THE MISSISSIPPI STATE TAX COMMISSION — Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS

JOHN E. STONE
4212 Brookdale
Jackson, Mississippi
Attorney for Appellee

OF COUNSEL:

Robert Taylor Carlisle
P. O. Box 960
Jackson, Mississippi

James E. Williams
P. O. Box 960
Jackson, Mississippi

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal in this case be dismissed on the following grounds:

1) the appeal is not within the jurisdiction of this Court; not having been taken within the time allowed under 28 U. S. C. §2101(c);

2) the appeal does not present a substantial federal question; and the judgment of the Supreme Court of the State of Mississippi rests on an adequate non federal basis.

I.

STATEMENT OF FACTS AND ISSUES OF APPEAL

This cause was originated by an assessment of the Mississippi State Tax Commission levied against ap-

pellant for chain store privilege taxes and penalties under the provisions of *Sections* 9300 through 9311, *Mississippi Code of* 1942, Recompiled. Appellant brought suit against the Chairman of the Mississippi State Tax Commission in the Circuit Court of Hinds County, Mississippi, seeking recovery of the taxes and penalties paid. The judgment of the Circuit Court denied the relief sought and dismissed appellant's suit. Appellant thereupon appealed to the Supreme Court of Mississippi, which affirmed the judgment of the lower Court. The final judgment of the Supreme Court was rendered on March 17, 1969, and no Petition for Rehearing was filed by appellant. The Notice of Appeal to the Supreme Court of the United States was filed by appellant in the Supreme Court of Mississippi on June 26, 1969.

Appellant, through certain of its divisions and subsidiaries, operates over 700 retail shoe stores and leased retail shoe departments in 45 states, including Mississippi. The Supreme Court of Mississippi, in its decision of March 17, 1969, determined that appellant was a "retailer" operating leased shoe departments in Mississippi as "stores" subject to the provisions of the Mississippi chain store privilege tax law contained in Sections 9300 through 9311, *Mississippi Code of* 1942, Recompiled.

II.

ARGUMENT

POINT I.

THIS APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT SINCE IT WAS NOT TAKEN WITHIN NINETY DAYS OF THE ENTRY OF JUDGMENT IN THE CAUSE BY THE SUPREME COURT OF MISSISSIPPI.

The Supreme Court of Mississippi rendered its final judgment in this cause on March 17, 1969, as shown in Appendix "C" to the Jurisdictional Statement, and no petition for rehearing was filed by appellant. Hence, any appeal from that judgment to this Court was required by 28 U. S. C. § 2101(c) to have been taken prior to June 16, 1969, this date being the nintieth day after entry of the judgment. Appellant failed to file its Notice of Appeal to this Court until June 26, 1969, and this Court is therefore without jurisdiction of the cause.

The existence of a state procedure allowing the filing of a petition for rehearing does not affect the finality of the judgment if the petition is in fact not filed, nor does the existence of the said procedure prevent this Court from asserting immediate jurisdiction over the cause. *Southern Railway Co.* v. *Clift*, 260 U. S. 316.

To the same effect:

Market Street Railway Co. v. *Railroad Commission*, 324 U. S. 548, 551-2:

"* * * The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment. * * * Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek our review begins to run."

The date of the Mandate of the Supreme Court of Mississippi, upon which appellant apparently relies for jurisdictional purposes (Jurisdictional Statement, page 3), is of no effect whatsoever in determining finality of judgment. A mandate is issued by the court merely for

the enforcement of the previously rendered judgment *Bailey v. Bailey*, 230 Mississippi 24, 91 So. 2d 545.

It is respectfully submitted that, if no petition for rehearing is filed during the time allowed therefor under state procedure, the judgment is final on the day when it is rendered by the state court. Hence, the present appeal should be dismissed for want of jurisdiction.

POINT 2

THE ISSUE INVOLVED IN THIS CASE WAS ONE OF STATE LAW CONSTRUCTION BY THE STATE COURT, AND THIS SPECIAL FEDERAL COURT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

The question is whether appellant is subject to the eight state tax and penalties levied under sections [illegible] through [illegible], Mississippi Code of 1942, Recompiled. In the matter of statutory construction it is respectfully submitted that, in the construction of state statutes, a state court's interpretation is unassailable by this Court. *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309, 96 L. Ed. 427.

The penalty imposed for delinquency in filing [illegible] Mississippi Code of 1942, Recompiled, is [illegible] and [illegible] interpretation.

The question of whether a state statute violates the constitutional guarantees of due process and equal protection of the laws by imposing a [illegible] upon the total number of [illegible] under the same circumstances is purely [illegible] within the taxing state or [illegible] substantial federal question. The issue has been clearly decided in the negative